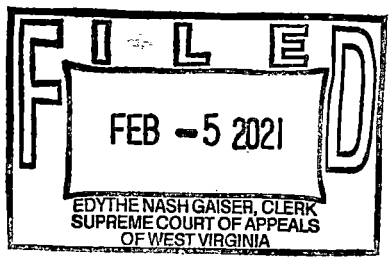

No. 20-0684

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAIRMONT TOOL, INC.,
Petitioner and Defendant Below,

v.

ADAM J. DAVIS, Individually and on Behalf of Those Similarly-Situated,
Respondent and Plaintiff Below.

REPLY BRIEF OF PETITIONER FAIRMONT TOOL, INC.

Civil Action No. 17-C-163
In the Circuit Court of Marion County, West Virginia
(Honorable David R. Janes, Judge)

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I. INTRODUCTION.

The instant issue revolves around cash advances and the 21st Century equivalent of cash advances, i.e., use of credit accounts, by an employer for the benefit of an employee. These are not arbitrarily assigned labels but, rather, accurate descriptions drawn from the nature of the transactions themselves. In his brief, Respondent Adam J. Davis ("Davis") objects to the descriptions without addressing the analysis behind the same and levels accusations about Fairmont Tool's business practices, accusations which find no foothold in evidence or reason.

Artfully dodging the pertinent issue once again, Davis seeks to paint a picture that ignores reality. Rather than deal with evidence, he portrays himself as some sort of "victim." His approach is understandable. To faithfully address the merits of his claim, he must come to terms with an immutable fact. He took cash and cash equivalent advances from his employer, Fairmont Tool, Inc. That singular fact brings his situation within the precedent of this Court prescribing that he and the class he purports to represent are not entitled to the relief sought.[1]

The centerpiece of this fable[2] is an unsupportable and pernicious accusation. Cherry-picking loaded questions/insinuations of his counsel,[3] Davis makes the Herculean leap to assert that, "Fairmont Tool essentially passed the costs of its safety policies onto it employees, then stepped into the role of a creditor to those same employees once they incurred expenses for company-mandated uniforms, boots, or other personal protection items." *Brief Resp.*, p. 8.

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1 *See, Rotruck v. Smith*, 2016 W.Va. LEXIS 69 *15-17 (W. Va., Feb. 10, 2016) (memorandum decision) (discussing in depth W. VA. CODE § 21-5-3(e) and the holding of *Clendenin Lumber & Supply Co., Inc. v. Carpenter*, 172 W. Va. 375, 305 S.E.2d 332 (1983)).

2 No allegation of wrongdoing was made against Davis or any class member until Davis unilaterally announced (during his deposition) his repudiation of the agreement to repay sums advanced on his behalf by Fairmont Tool, necessitating the filing of the counterclaim. AR1121-25; AR1167. Contrary to the tale being offered, Davis and the class were not the victims of some allegorical predatory lender. They were employees provided monetary advances by their employer in return for nothing more than the promise of repayment.

3 *Brief Resp.*, at pp. 4-8.

The glitch is that the record is devoid of any actual support for this fanciful conclusion. A quick observation of the cited testimony reveals that the loaded terms (such as "debt," "credit," and "safety function") came from the mouth of counsel, not the witness.[4] Contrary to the insinuations, the witness contradicted counsel's manipulative characterizations. Disagreeing with the premise of the question, payroll administrator Jamie Kelley testified that Fairmont Tool only sought to recoup what it advanced and did not charge interest.[5] She further testified via affidavit that the uniform service referred to by Davis was "voluntary" – not mandatory – and that Fairmont Tool paid for the cost of safety boots through a yearly allowance.[6]

Beyond the fact that selective interpretation of testimony is not enough to support summary judgment, Respondent contradicts the fallacious premise himself. In his own sworn testimony, Davis admitted that Fairmont Tool paid the full costs of its own safety programs.[7] He testified that Fairmont Tool provided him $120 per year[8] with which he could buy a pair of metatarsal boots.[9] He further admitted that Fairmont Tool provided him a flame-retardant coverall that he could wear when such clothing was required (at client job sites).[10] Finally, he testified to later learning of a rental and laundry service option[11] and confirmed he was not told he had to use it but voluntarily chose to do so (agreeing to reimburse Fairmont Tool for part of the costs thereof).[12]

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4 *Brief Resp.*, pp. 4-6, 7-8. Davis later quotes from his own counsel's questions in claiming to have "proven" that Fairmont Tool is a "creditor." *Id.*, p. 22.

5 AR1632. This testimony was redacted from the quotations in Davis' brief. *Brief Resp.*, p. 5. Moreover, counsel's objection to the questions recited (and the loaded words therein) were conspicuously omitted. *See, id.*, p. 6; AR1636-37.

6 AR1681-82.

7 AR1787-94.

8 AR1787.

9 AR1793.

10 AR1793-94.

11 AR 1794.

12 *Id.*

The unproven accusation conveniently follows a classic red herring about intentionally excluding a category of "cash advances" from the class definition. It is pure sophistry to suggest that the mere labeling of an internal spreadsheet whereby Fairmont Tool tracked checks made payable to employees is persuasive evidence that other methods of advancing monetary sums to employees do not represent salary advances or the equivalent. Davis deliberately evades the merits of the argument while offering nothing of substance and, in fact, making the case for Fairmont Tool. By omitting a category of "cash advances" from the class, Davis tacitly admits that this Court rightly held in *Rotruck* that deductions for salary advances are not subject to the strictures of W. Va. Code § 21-5-3(e).

The fact remains that there is NO evidence to support the conclusion and Davis' bald statement that Fairmont Tool "passed the cost of its safety policies onto its employees," much less that Fairmont Tool somehow became a "creditor" of its employees, such as Davis, in that respect. *Brief Resp.*, p. 8. The reality is that Davis obtained salary advances from his employer, Fairmont Tool. These salary advances took the form of using company accounts for personal purchases, including a CB radio antenna for his vehicle, boots for his son, meals for himself and his family, a winter coat, and a uniform rental and cleaning service that was not a requirement of his employment. Fairmont Tool was (and is) legally entitled to recoup these advances from Davis, as he confirmed in his sworn statement that they were for personal items that he took with him when he left employment. Just like this Court found with respect to the insurance agency in *Rotruck*, the voluntary agreement for repayment of these advances through the payroll system was not a wage assignment under W. VA. CODE § 21-5-3(e) with respect to Davis or the class certified below. The Circuit Court erred in finding otherwise and awarding damages to Davis and the certified class.

II. DISCUSSION IN REPLY:

A. THE CIRCUIT COURT ERRED BY APPLYING SECTION 21-5-3(e) TO THE TRANSACTIONS AT ISSUE.

This Court rightly decided *Rotruck* and Fairmont Tool is not a "creditor" under this Court's definition of that term in *Clendenin*. To reach Respondent and the circuit court's contrary conclusions, one must ignore Respondent Davis' own testimony, the Complaint, and the fact-patterns, findings and holdings of *Clendenin* and its progeny, including *Rotruck*.

From the beginning with the filing of his Complaint, Respondent's claim has been that the disputed transactions were "Unlawful Assignment[s] of Employment Wages" pursuant to W. VA. CODE § 21-5-3(e). In the operative paragraph of Count II of the Complaint, he alleges that, "[t]he Defendant unlawfully assigned the employment wages of the Plaintiff and other similarly-situated class members in violation of W. Va. Code § 21-5-3(e)."[13] Thus, the only issue in controversy was whether the deductions were violative of Section 21-5-3(e) – the central issue addressed by this Court in *Clendenin*, which holding was then applied in *Rotruck*.

Respondent asserts that *Clendenin* and progeny require summary judgment in his favor when the precedent clearly dictates just the opposite. In *Clendenin*, this Court addressed the limits of Section 21-5-3. Reading W. VA. CODE § 46A-2-116 and W. VA. CODE § 21-5-3 *in pari materia*, this Court concluded that Section 21-5-3 "prescribes the required form of an assignment of earnings by an employee who voluntarily assigns future earnings ***to another*** in satisfaction of a debt." *Id.*, at 380, 305 S.E.2d at 337 (emphasis added). This Court then held that employers, such as Clendenin, were included within the definition ***when*** they met a specific condition.

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[13] AR0025 (*Complaint*, ¶54). By contrast, Davis made an individual claim for failure to timely pay wages (pursuant to W. VA. CODE § 21-5-4) in Count I. AR0024-25. As he admits, that claim was completely settled by agreement before the Circuit Court had occasion to even address the efficacy of the class claims. *Brief Resp.*, p. 8.

> For the foregoing reasons, we hold that the phrase "to another" as used in the definition of an assignment of earnings under W. Va. Code, 46A-2-116(2)(b) [1974], ***includes an employer when that employer is also the creditor of the employee***. As such, the January 2, 1979, agreement between Carpenter and Clendenin in which Carpenter agreed to the withholding of $30.00 per pay period by Clendenin in satisfaction of his outstanding credit balance, was an assignment of earnings under W. Va. Code, 46A-2-116(2)(b) [1974], and did not meet the form requirements of W. Va. Code, 21-5-3 [1979]. The trial court, therefore, erred when it held as a matter of law and fact that the January 2, 1979, agreement between the parties was not an assignment of earnings, thereby exempting it from the requirements of W. Va. Code, 21-5-3 [1979].

Id. at 381, 305 S.E.2d at 338 (emphasis added). The emphasis on the requirement that the employer be a creditor of the employee was not casual. After all, this Court deliberately memorialized that holding by issuing a new syllabus point.

> 1. The phrase "to another" as used in the definition of an assignment of earnings under W. Va. Code, 46A-2-116(2)(b) [1974], includes an employer when that employer is also the creditor of the employee.

Id. at Syl. Pt. 1. It is this new holding that was correctly applied by this Court 29 years later in *Rotruck* to find that salary advances are not assignments of earnings subject to W. VA. CODE § 21-5-3(e). *Rotruck v. Smith*, 2016 W.Va. LEXIS 69 *15-17 (W. Va., Feb. 10, 2016) (memorandum decision).

Without analysis, Davis argues that *Rotruck* is not precedential because it clearly "conflicts with the published decision in *Clendenin*." *Brief Resp.*, p. 21. In the same passage, Davis necessarily concedes that memorandum decisions, such as *Rotruck*, are legal precedent unless they conflict with a published opinion. However, his unadorned conclusion requires the Court to ignore syllabus point 1 of *Clendenin* and its application in *Rotruck*.

In *Rotruck*, this Court reaffirmed its need in *Clendenin* to read the wage assignment provisions of the WPCA and the WVCCPA together because "[t]he WPCA contains certain requirements applicable to the assignment of earnings, but it does not define the term." *Rotruck*,

2016 W. Va. LEXIS 69 *15. Recognizing the adoption of the definition from W. VA. CODE § 46A-2-116(2)(b) in *Clendenin* and the holding in Syllabus Point 1 of that decision, this Court applied that holding to the transactions at issue in *Rotruck*, holding steadfast thereto.

In *Rotruck*, the insurance company employer provided "financial assistance" to the employee with her bills and basic necessities, advances not present in *Clendenin* (as the amounts deducted were to satisfy retail purchases by Carpenter of Clendenin Lumber products). Applying syllabus point 1 of *Clendenin*, this Court correctly concluded that an employer could not be considered a "creditor" under the WPCA because transactions akin to salary advances did not satisfy the definitional criteria.

> Rather than being consumer credit transactions or consumer loans, the advances to Ms. Rotruck by Insurance Queen appear to be more akin to salary advances graciously provided in response to Ms. Rotruck's financial need. Under these circumstances, the circuit court correctly concluded that the advances by Ms. Rotruck's employer, Insurance Queen, were not wage assignments. Accordingly, we find that the circuit court did not err in denying Ms. Rotruck a new trial on this issue.

Id. at *17-19.

Far from being in conflict, the *Rotruck* decision applied the singular new syllabus point from *Clendenin*. "Signed opinions containing original syllabus points have the highest precedential value because the Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court." Syl. Pt. 1, *State v. McKinley*, 234 W. Va. 143, 149, 764 S.E.2d 303, 309 (2014). Respondent's strained attempt to evade the precedential value of *Rotruck* is telling. Respondent creates a false conflict and asks this Court to apply his own construction of the statutory provision to "findings" he offers regarding Fairmont Tool's alleged conduct. In so doing, Respondent asks this Court to ignore the reality that, in *Rotruck*, this Court

faithfully applied the new point of law announced in *Clendenin* and that these so-called "findings" are unjustified on the record.

Certainly, the trial court's "findings" regarding the now central accusation that Fairmont Tool passed along the costs of its safety programs, AR1949-50 (if they were in fact findings of fact), were clearly contrary to the evidence and reversible error. This Court reviews a grant of summary judgment *de novo*, Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), and, therefore, applies "the same standard as a circuit court," reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335-36 (1995), *citing Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538, 553 (1986).

As for the trial court's "finding" that Fairmont Tool stepped into the role of "creditor," the point is improperly characterized in the order prepared by counsel as a finding of fact.[14] It its letter ruling, the Circuit Court found that Fairmont Tool violated the WPCA and acted as a creditor without any explanation. AR1849. Respondent added the gratuitous "findings" in this regard to the proposed order as if they were uncontested. The only uncontested facts are those set forth above.

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[14] Legal conclusions couched as "findings of fact" are just an example of the confusing orders prepared by counsel for Respondent in this matter and objected to by Fairmont Tool pursuant to West Virginia Trial Court Rule 24.01. This Court recently admonished the bar to avoid the preparation and tendering of such "heavily partisan orders" or "over-reaching orders which fail to succinctly identify and address the critical factual and legal issues." *Taylor v. W. Va. Dept. of Health and Human Res.*, 237 W. Va. 549, 558, 788 S.E.2d 295, 304 (2016). Just as there, the instant orders are "heavily partisan orders" that contain "a thicket of argumentative rhetoric," Respondent's "version of the disputed facts and advocated inferences," "multiple legal determinations, any one of which may [be] dispositive" imbedded therein, and "fail so demonstrably to articulate a cogent outline of the claims subject to disposition." *Id.* Especially with respect to "findings of fact" and the plethora of references to stipulations with no clear indication as to whether the ruling was dependent on the same or the reference was merely gratuitous or alternative in nature, Fairmont Tool respectfully submits that the instant situation rivals that faced by the Court in *Taylor*.

Furthermore, the conclusion necessarily depends upon the interpretation and application of the holdings in *Clendenin* and *Rotruck*. Respondent does not even address this Court's discussion of the proper definition of "creditor" under the Act from *Rotruck*. Effectively conceding the point that *Rotruck* adopted the definitional framework from *Clendenin*, Respondent necessarily concedes the soundness of this Court's reasoning in *Rotruck*. Given that this Court's standard holds that summary judgment should not be granted where there is a genuine issue, it would be more appropriate to characterize the trial court's findings as conclusions of law that are subject to *de novo* rule. And, for the reasons set forth above, those conclusions should be reversed as erroneous.

Contrary to Respondent's analytically wanting assertion, *Rotruck* is essentially on all fours with the instant situation. Just like the insurance company employer provided gas for the employee's car, medication, and cash to cover emergencies, *Rotruck*, at *5, Fairmont Tool paid for personal shoes (for Davis and his son), meals (for Davis and his family), Respondent's winter coat and a cleaning service. AR1787-93. Just like the insurer made car payments for its employee, *Rotruck*, at *5, Fairmont Tool paid for a part for Davis' car and provided stock supplies for his personal use. AR1787-93. The manner of the payments is immaterial for purposes of statutory analysis. Whether the insurer in *Rotruck* drew cash or wrote checks for some of those expenditures, this Court's holding was tied to the personal assistance nature of the transactions. Fairmont Tool did the equivalent, allowing Respondent to use its accounts with third-party vendors for his personal and family needs. Both employers had the same understanding. Both employees voluntarily agreed to reimburse the employers for the advances.

The situation is far more akin to *Rotruck* than that found in any other case cited by Respondent. In *Clendenin*, the employer was selling its commercial products to the employee. Fairmont Tool did no such thing. Likewise, the instant situation does not involve the payments

made to acquire a foreign workforce, such as that in *Jones v. Tri-County Growers, Inc.*, 179 W. Va. 218, 366 S.E.2d 726 (1988) or the passing along of business costs, such as that found in *Robertson v. Opequon Motors, Inc.*, 205 W. Va. 560, 519 S.E.2d 843 (1999). While these cases discussed the history of the WCPA, neither *Jones* nor *Robertson* analyzed a similar situation or discussed the definitional holding of *Clendenin* in any detail.[15] Only *Rotruck* applied the holding of *Clendenin* to the type of transactions at issue here.

Consonant with *Clendenin* and *Rotruck*, no wages were ever "assigned" to "another," as contemplated by West Virginia Code § 21-5-3(e) and the companion definition found in West Virginia Code § 46A-2-116. Just as this Court held in *Rotruck*, the transactions at issue were for recoupment of salary advances to Fairmont Tool's employees and, thus, not assignments of earnings under Section 21-5-3(e).

B. THE CIRCUIT COURT ERRED IN AWARDING LIQUIDATED DAMAGES ACROSS THE BOARD FOR ALLEGED VIOLATIONS OF W. VA. CODE § 21-5-3(e).

Though the order below is confusing in its approach,[16] Davis now argues that the award of liquidated damages was made pursuant to the parties' stipulations. *Brief Resp.*, p. 23. As discussed below, the trial court abused its discretion and erred in denying Fairmont Tool's motion to withdraw from the stipulations and applying legal stipulations contrary to West Virginia law.

Davis does not argue the plain text of the WPCA as authorizing the liquidated damages award. To the contrary. Ignoring the statutory language, he makes the emotional plea that

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[15] The *Clendenin* opinion is not referenced at all in *Robertson*.

[16] AR3475-76. The order entered by the trial court contained both a reference to the stipulations as authority for the award of liquidated damages and a conclusion "[]though not necessarily dispositive" that the award is "consistent" with the WPCA's purpose. AR3475, ¶ 24. Thus, the order is conditionally worded and the quintessential "kitchen sink" order frowned upon by this Court. *See*, *Taylor*, 237 W. Va. at 558, 788 S.E.2d at 304 and note 15, *supra*.

permitting a remedy to separated employees not available to current employees would be inequitable. *Brief Resp.*, p. 25. Davis effectively concedes that Section 21-5-4(e) does not apply to current employees ***by its express terms***. Instead of making a statutory construction appeal, Davis implores this Court to act as a super-legislature and enact such a remedy for current employees. This Court has soundly rejected pleas to write or rewrite legislation that is plain and unambiguous on its face. *See, Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299 n. 10, 624 S.E.2d 729, 736 n. 10 (2005); *Liberty Mut. Ins. Co. v. Morrisey*, 236 W. Va. 615, 626, 760 S.E.2d 863, 874 (2014), quoting, *Soulsby v. Soulsby*, 222 W. Va. 236, 247, 664 S.E.2d 121, 132 (2008).

For the reasons set forth in the Brief of Petitioner, Fairmont Tool is entitled to reversal of the liquidated damages award and remand to the trial court for entry of judgment in favor of Fairmont Tool on such claims for relief related to the alleged violations of Section 21-5-3(e).

C. THE CIRCUIT COURT ERRED IN AWARDING LIQUIDATED DAMAGES AT THE RATE OF THREE TIMES ACTUAL DAMAGES.

Respondent makes the same conditional argument with regard to the trial court's assessment of liquidated damages at three (3) times the amount of the deductions at issue. *Brief Resp.*, p. 27. Davis ignores the plain language of the statute in favor of reliance on the parties' disputed "stipulations." *Id.* The propriety of the stipulations is addressed below. However, it deserves mention that Davis' position in this regard is internally and prejudicially inconsistent. Fairmont Tool timely sought to withdraw from the stipulations, which should have been granted as a matter of right, and Davis tacitly admits to having breached the agreement underlying the same. Moreover, Davis argued below that Fairmont Tool was not entitled to recover on the counterclaim based upon the prohibition against modifying the WPCA set forth in W. VA. CODE

§ 21-5-10.[17] Yet, admitting that the liquidated damages award was contrary to the express provisions of the WPCA, Davis nevertheless claims the parties were free to and did "establish an agreed-upon framework for damages in this case" via the written stipulations. *Brief Resp.*, p. 27 n.6. Respondent cannot seriously be heard to argue the assignment of earnings provision of the WPCA cannot be "contravened" by private agreement while suggesting that he can privately agree to modify the express remedies provisions at any time.

Respondent further argues that the trial court was justified in making one award based upon a legal conclusion by letter and then entering an order prepared by Respondent's counsel (objected to by Petitioner) making a completely different award (as Respondent would have this Court determine) on grounds not raised in the letter.[18] Not only does Respondent's position strain credulity, it is legally suspect. The amendment to the liquidated damages provision of the WPCA was enacted as part of the same 2015 tort reform as the backpay and punitive damage statutory amendments at issue in *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017). The logic of *Martinez* applies with equal force here. As this Court observed, "[s]tatutory changes that are purely procedural in nature will be applied retroactively." Syl. Pt. 4, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2002). This Court went on to hold that statutes that do not create new rights or take away vested ones and statutes that related to practice, procedure or remedies are remedial in nature "and are not within the strict application of the rule of presumption against retroactivity." *Martinez*, 239 W. Va. at 617, 803 S.E.2d at 587 (citations and quotations omitted).

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[17] AR1961-62.

[18] This is precisely the type of confusing record this Court warned against in *Taylor*. *See*, note 15, *supra*.

This Court further reiterated its prior holding that the fact that part of the factual situation to which a statute is applied occurred prior to its enactment does not make application of that remedial statutory provision retroactive. *Martinez*, 239 W. Va. at 617, 803 S.E.2d at 587, citing, Syl. Pt. 3, *Sizemore v. State Workmen's Comp. Comm'r*, 159 W.Va. 100, 219 S.E.2d 912 (1975). This Court observed that damages, such as back pay and punitive damages, are remedial in nature and a plaintiff has no vested right to such damages prior to entry of judgment. *Martinez*, 239 W. Va. at 618, 803 S.E.2d at 588 (citations and quotations omitted).

> As we have stated, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive . . . ." *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 351, 752 S.E.2d 372, 382 (2013) (quoting *Landgraf* [*v. USI Film Prods.*] 511 U.S. at 273-74). It is recognized that "[i]n general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto." 3 Sutherland Statutory Construction § 60:1 (7th ed. 2016).

Id. Accordingly, this Court concluded that the 2015 amendments were not retroactive and were to be applied "irrespective of when the cause of action accrued or when the claim or suit is filed." *Id.* at 618-19, 803 S.E.2d at 588-89.

The same rationale applies here. As asserted by Respondent repeatedly, the WPCA is a remedial statute. *See, e.g., Brief Resp.*, p. 15. The 2015 amendment to W. VA. CODE § 21-5-4(e) was, like those referenced in *Martinez*, enacted to amend the relief available to certain litigants (in this case, those making claims pursuant to the WPCA). Neither Davis nor the class members had a vested right in such relief, much less at the time of enactment in 2015. Respondent filed the instant claim two (2) years later, on May 31, 2017. AR0001; AR0018. The judgment in this action was not rendered for another two (2) years, on November 7, 2019. AR3467.

The award of more than the statutorily prescribed liquidated damages was clearly erroneous and Fairmont Tool is entitled to reversal of the same and remand for entry of judgment in its favor on Respondent's claims.

D. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF ON FAIRMONT TOOL'S COUNTERCLAIM AND OTHERWISE DENYING OFFSETS FOR FAIRMONT TOOL'S ADVANCES ON BEHALF OF PLAINTIFF AND THE CLASS.

Respondent offers the illogical argument that, because the deductions were found to be unlawful assignments of earnings, the agreements underlying the counterclaim were void. Davis' argument completely misses the point.

At the outset of the litigation, Respondent leveled his argument that the payroll deductions were unlawful under the WPCA. If successful, he stood to recoup all amounts so deducted. However, assuming his agreement to reimburse Fairmont Tool for amounts advanced remained untouched, Fairmont Tool would have retained a claim for those sums (whether by offset or separate action). As the trial court found, when Davis admitted his prior agreement to reimburse Fairmont Tool but expressly repudiated the same, a claim for anticipatory breach sprang up.[19]

In his brief, Respondent unnecessarily confuses the issue by injecting his liability arguments as to the deductions, declaring the agreement to reimburse a "void agreement" without any serious analysis of the situation. To logically sustain such an argument, Respondent would have to contend the WPCA strictly forbids employers and employees from entering into **any agreements** other than payroll deductions exclusively listed in the statute and assignments of

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[19] AR1124-25.

earnings memorialized in the manner prescribed by Section 21-5-3(e).[20] The absurdity and erroneous nature of this reasoning is self-evident.

Neither Respondent nor the trial court below pointed to a single provision of the WPCA that prohibits an employee and employer from agreeing to an arrangement whereby the employer provides the employee cash or the cash equivalent. Nor do they point to a provision of the WPCA prohibiting an employee from agreeing to repay such an advance or benefit provided by his/her employer. Finally, they fail to identify a single provision of the WPCA that prohibits an employer from bringing an action against an employee to enforce the promise to repay such an advance or benefit.

The reason is simple. There are no such provisions in the WPCA, as the WPCA controls only the manner and method of payment of wages, not employer-employee relations in general. W. VA. CODE § 21-5-3(e) does not prohibit such agreements and, for that reason, W. VA. CODE § 21-5-10 did not apply to invalidate the counterclaim. Fairmont Tool was entitled to bring such an action following Davis' repudiation of the admitted agreement to repay Fairmont Tool. The counterclaim was grounded in the undeniable agreement to repay and was not dependent upon any alleged "unlawful wage assignment." The trial court erred in finding the claim "void" pursuant to the WPCA and Fairmont Tool is entitled to reversal of that ruling and reinstatement of its counterclaim.

E. THE CIRCUIT COURT ERRED IN DENYING FAIRMONT TOOL THE FUNDAMENTAL RIGHT TO WITHDRAW FROM THE PARTIES' FIRST SET OF STIPULATIONS.

[20] Respondent's exclusion of "cash advances" is a tacit admission that the WPCA does not prohibit all agreements as to payroll deductions, as this Court held in *Rotruck*.

Respondent's reliance on *W. Va. DOT v. Veach*, 239 W. Va. 1, 799 S.E.2d 78 (2017) is misplaced. In that case, this Court was faced with an entirely different situation than that in the instant case. There, the stipulation at issue was directed at an issue central to liability that was entered into three (3) years after the mandamus proceeding was initiated and two (2) years after the condemnation action was commenced. *Id.* at 6, 799 S.E.2d at 83. Moreover, the same stipulation in the companion action had already been submitted to a jury and trial completed. *Id.* at 6-7, 799 S.E.2d at 83-84. The motion to withdraw was filed two (2) years after the stipulation as part of motions for summary judgment on the very liability issue resolved by the stipulation. *Id.* at 7, 799 S.E.2d at 84. Notably, this Court found significant the fact that the DOT "*pleaded* the very same facts in its petition for condemnation" and made other litigation moves "in effect acknowledging that the Veach Heirs owned the mineral rights and *specifically the limestone*." *Id.* at 9, 799 S.E.2d at 86. This Court further noted the inability to put the parties back in the place they would have been before the stipulation. *Id.*

> Critically, DOH's stipulation pertains to a substantive issue previously represented as undisputed as opposed to a procedural issue, like the one in [*State ex rel.*] *Crafton* [*v. Burnside*, 207 W. Va. 74, 528 S.E.2d 768 (2000)]. As discussed above, whether a stipulation relates to a procedural or substantive issue is a dominant consideration in determining whether rescission is appropriate as the latter carries with it more danger of prejudice. *See* 4 Willston on Contracts § 8.50 (4th ed. 2016).

Id., at 10, 799 S.E.2d at 87. This Court also found the DOT's pleading of the same facts stipulated significant as to both grounds for relief – improvidence and legality – in upholding the trial court's decision to deny the motion to withdraw. *Id.* at 10, 799 S.E.2d at 87.

Unlike *Veach*, Fairmont Tool moved to withdraw from the stipulations just eight (8) days after the same were submitted to the trial court below.[21] The motion was made more than two (2)

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[21] AR0304.

years before the trial court even considered damages.[22] And, the stipulations at issue related to procedural remedies (*see*, discussion of *Martinez*, above), not the substance of the claims asserted.[23] Unlike *Veach*, there was no showing of prejudice on the part of Respondent. Nor could there be, given the passage of time between the motion and the submission of the question of damages. Finally, unlike *Veach*, the underlying motion was also based upon a breach of contract noticeably absent in *Veach*. Here, as admitted by Respondent, the stipulations were premised upon his representation that he would forego the potentially shared expense of an expert witness on damages.[24] Respondent's counsel even admitted the same on the record at the hearing on August 17, 2018, more than a year before motions were even filed as to damages.[25]

Unlike *Veach*, Fairmont Tool demonstrated an actual breach of the stipulation by Respondent. Just two (2) months after the trial court entered the order denying Fairmont Tool's motion, Davis retained an expert economist on December 7, 2018, breaching the underlying agreement and effectively reneging on the consideration for the Stipulations.[26]

Respondent offers a half-hearted disingenuous claim that "there is absolutely nothing it the stipulations themselves suggesting that they were premised on an underlying agreement." *Brief Resp.*, p. 35.[27] Respondent does not deny the statements made on the record and in the emails

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22 AR1994; AR3467.

23 AR0304.

24 AR0884-906; AR1024-25.

25 *Id.*

26 AR1255. Ironically, Respondent's essentially argues that he was prejudiced because the stipulations provided a remedy he was not otherwise entitled to legally. This is a curious theory of prejudice, to say the least. Respondent makes the disingenuous suggestion that the motion was just "buyer's remorse." Admittedly going back on his agreement and incurring expenses he later sought to shift to Fairmont Tool, Respondent essentially "sold" Fairmont Tool nothing more than snake oil.

27 The further suggestion that the hiring of an expert economist was prompted by Fairmont Tool's counterclaim is equally absurd. The counterclaim for amounts expended depended upon the very same spreadsheets and internal documentation as the Respondent's claim and, for that matter, stipulations 1-3 of the *Parties' First Set*, AR0123, stipulations as to fact that Fairmont Tool agreed to abide by. AR0304.

discussing the stipulations. The attempt to "brush off" the agreement is particularly troublesome, given the fact that the experts ultimately hired by Respondent charged to calculate damages based upon the very stipulations sought as an alternative to such witnesses.[28]

The law is clear. Stipulations as to the law and procedural matters are not subject to the same strictures as those as to substance, such as in *Veach*. A party may withdraw from stipulations at any time before the stipulation is received into evidence, especially where, as here, the agreement has been breached. Cleckley, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, 4th Ed. Vol. 2, § 12-5(b), p. 12-80. The trial court erred in denying Fairmont Tool the right to withdraw from stipulations as to procedural remedies, especially after being put on notice of Respondent's breach of the underlying agreement. Respondent failed to make even a proffer of potential prejudice and, in fact, could not have suffered any given the additional time before the issue of damages was ripe and his unilateral decision to retain an expert witness on the issue anyway.

F. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEY FEES, COSTS AND SERVICE AWARD TO PLAINTIFF.

As with the other orders prepared by Respondent, the trial court's order granting fees and costs included unnecessary and unsupported statements.[29] In addition to unsubstantiated statements concerning the need of Respondent to retain expert witnesses as support for shifting that cost to Fairmont Tool, the trial court erred in finding that four (4) attorneys billing at $350 per hour were necessary in this matter. There was no reason given why the case (where liability was premised upon a singular proposition – that the deductions at issue violated Section 21-5-3(e))

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28 AR2245-2402.

29 *See*, note 15, *supra*.

required more than original counsel, practicing out of Bridgeport, whom Respondent points out has 14 years of experience practicing employment law in this State. *Brief Resp.*, p. 37.

"The general factors outlined in Syllabus Point 4 *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986) should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement." Syl. Pt. 3, *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989). The prevailing party must produce evidence, in addition to affidavits of the party's own attorneys, demonstrating that the rates requested correspond to "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). The relevant community is the one in which the court sits. *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988).

Respondent did not meet this burden and the trial court committed error in awarding fees based upon an insufficient record. Respondent supplied nothing more than an affidavit from a Charleston-based former partner in his counsel's firm in support of his claim of reasonableness and reference to the *Laffey* Matrix.[30] In addition to the obvious deficiency of the affidavit (conflict and location), Chief Judge Chambers of the Southern District of West Virginia rejected such references to the "Matrix" as insufficient to meet the "relevant community" standard. *See*, *McGee v. Cole*, 115 F.Supp.3d 76 (S.D. W. Va. 2015).

By contrast, Fairmont Tool provided a recent order of the same circuit applying a $250 per hour rate for local employment law attorneys.[31] While the attorneys in that matter did not possess Mr. Hansberry's level of expertise, the combined hours of four (4) different attorneys, each at a

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30 AR3567.

31 AR3641.

rate of $350 per hour, was not commensurate with the needs of the case and the prevailing local rate.

III. CONCLUSION.

Contrary to the Respondent and trial court's conclusions, the record was clear. There was nothing nefarious about the situation here. By his own sworn testimony, Respondent Davis admitted that Fairmont Tool paid the costs of safety boots and flame-retardant coveralls. The deductions at issue only came about because Davis asked for and received advances to purchase personal items for himself and his family, including automobile parts, meals for his family, boots and winter clothes for him and his family and a rental and cleaning service Davis desired. For this, Fairmont Tool merely required Davis to repay the sums extended on his behalf.

As such, the transactions at issue were not "assignments of earnings" subject to W. VA. CODE § 21-5-3(e), which this Court so held in *Rotruck*. Respondent breached the agreement underlying the unnecessary procedural stipulations as to liquidated damages, such that Fairmont Tool should have been allowed to withdraw from same. And, even if this Court were to find Section 21-5-3(e) applicable, Fairmont Tool was and is entitled to prosecute a claim for reimbursement of all such sums advanced.

For all these reasons, as well as those that may become apparent to the Court, Fairmont Tool respectfully prays this Honorable Court grant its appeal, reverse the orders of the Circuit Court of Marion County, West Virginia, and remand this matter for entry of judgment as a matter of law in favor of Fairmont Tool and dismissal of all claims, with prejudice.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, I served true and correct copies of the foregoing ***"Reply Brief of Petitioner, Fairmont Tool, Inc."*** on the following counsel of record by electronic mail and United States mail, first class, postage paid, and addressed as follows:

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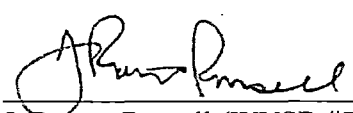

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